BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ED GILBERTSON	)	
Claimant	)	
V.	)	
	)	
CASEY'S GENERAL STORE	)	
Respondent	)	Docket No. 1,060,639
AND	)	
	)	
EMCASCO INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appealed the April 29, 2015, Award[1] entered by Administrative Law Judge (ALJ) Rebecca A. Sanders. The Board heard oral argument on September 9, 2015.

APPEARANCES

John J. Bryan of Topeka, Kansas, appeared for claimant. Ronald J. Laskowski of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument, the parties agreed the Board may consider the *Guides*.[2]

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[1] On April 30, 2015, the ALJ entered a Nunc Pro Tunc Award to correct the date of the Award to April 29, 2015. On May 6, 2015, the ALJ entered a Nunc Pro Tunc Award to correct the paragraph on page 10 of the Award regarding future medical benefits. The Board considers the April 30 and May 6, 2015, Nunc Pro Tunc Awards appealed.

[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted. The parties cannot cite the *Guides* without the *Guides* having been placed into evidence. *Durham v. Cessna Aircraft Co.*, 24 Kan. App. 2d 334, 334-35, 945 P.2d 8, *rev. denied* 263 Kan. 885 (1997). The Board has ruled against exploring and discussing the *Guides*, other than using the Combined Values Chart, unless the relevant sections of the *Guides* were placed into evidence. E.g., *Billionis v. Superior Industries*, No. 1,037,974, 2011 WL 4961951 (Kan. WCAB Sept. 15, 2011) and *Dunfield v. Stoneybrook Retirement Com.*, No. 1,031,568, 2008 WL 2354926 (Kan. WCAB May 21, 2008).

Claimant indicated he was not seeking reimbursement for medical expenses related to his left knee replacement. On September 10, 2015, claimant's attorney filed a letter brief containing additional arguments and an attached definition of a meniscus tear from the Mayo Clinic. Respondent's counsel filed a written objection. The Board will not consider claimant's letter or the attached definition of a meniscus tear, because they are not part of the record.

ISSUES

The Award stated:

> All but one doctor who testified in this case found that the prevailing factor that caused Claimant to need a knee replacement was the preexisting arthritis and degeneration. Only Dr. Prostic attributed his entire rating to the work accident of September 19, 2011. Dr. Fevurly found that there was no impairment due to the work accident. Dr. Jones who evaluated Claimant at the request of the Court found that Claimant has a ten percent impairment due to the work accident. The Court finds that Dr. Jones' opinion is the most credible and Claimant's permanent impairment due to the work accident is ten percent to the left lower extremity. The need for the left knee replacement was not due to the work accident and did not arise out of and in the course of employment[.]
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> . . .
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> Claimant's request for future medical treatment is denied. Most of the future medical treatment that is recommended is due to the knee replacement and the knee replacement condition is not compensable.[3]

Claimant contends he injured his left knee arising out of and in the course of his employment. Claimant maintains the left knee replacement he underwent was at least partially caused by his work injury and was needed to palliate the resulting pain. He contends he is entitled to an award for a 43% left lower extremity functional impairment and future medical benefits.

Respondent contends claimant failed to prove personal injury by accident arising out of and in the course of his employment and failed to prove his work accident was the prevailing factor causing claimant's injury, the need for medical treatment or disability.

The issues before the Board on this appeal are:

1. Did claimant's accidental left knee injury arise out of and in the course of his employment?

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[3] ALJ Award at 9.

2. What is the nature and extent of claimant's disability?

3. Is claimant entitled to apply for future medical benefits?

FINDINGS OF FACT

Claimant, who worked for respondent 26 years, was a service supervisor. He traveled to different stores and fixed everything on-site including computers, plumbing, electrical, refrigeration and petroleum. Claimant, while in Holton, Kansas, on September 19, 2011, was taking an oxygen acetylene torch up a ladder when his foot slipped, he fell down and something in his left knee popped. His left knee became painful and swollen. Claimant went to the emergency room, where x-rays were obtained and his knee was immobilized. Claimant was referred to Dr. Dale Garrett, who removed fluid from claimant's left knee, gave claimant a cortisone injection and prescribed physical therapy.

Claimant testified he had left knee arthroscopic surgery as the result of a South Dakota work accident in 1990 or 1991, or approximately 20 years prior to his accident. He received no treatment after surgery and had no left knee range of motion limitations in the 20 years prior to his September 19, 2011, accident. As a child, he had surgery for a left kneecap injury. In the 1980s, he had a work-related right knee injury and underwent two arthroscopic surgeries. Claimant testified that immediately before the September 19, 2011, accident, he had no left knee symptoms and was taking no medication.

At respondent's request, Dr. John H. Gilbert, a board-certified orthopedic surgeon, evaluated claimant on November 18, 2011. Claimant reported the aforementioned mechanism of injury. When he initially testified, Dr. Gilbert indicated claimant reported having exertional and post-exertional left knee symptoms prior to his September 19, 2011, accident. However, he later agreed claimant could have been referring to the two-month period after his work accident. The doctor reviewed x-rays which revealed moderate to marked degenerative disease throughout the left knee. A September 23, 2011, CT scan reviewed by Dr. Gilbert showed degenerative disease throughout the left knee. An MRI was not administered because claimant has a pacemaker. The doctor's impression was osteoarthritis of the left knee with an acute knee strain. He testified claimant's September 19, 2011, accident resulted in an acute left knee sprain.

In a letter dated December 13, 2012, Dr. Gilbert indicated the prevailing factor for claimant's left knee replacement was his preexisting left knee degenerative arthritis, which was exacerbated and caused to be symptomatic by his September 19, 2011, injury. The doctor testified, "I believe that the knee replacement is as a consequence of and sequela to an injury to his knee sustained approximately 1988 while employed at Casey's General Store."[4] On January 25, 2013, Dr. Gilbert indicated a left knee replacement was

[4] Gilbert Depo. at 18.

appropriate and claimant was at maximum medical improvement (MMI) for his September 19, 2011, left knee injury. The doctor testified he made no recommendations for future medical treatment related to claimant's September 19, 2011, injury.

Dr. Gilbert related that symptoms of osteoarthritis are pain, swelling, occasional instability, popping, snapping, cracking and deformity. He testified non-specific pain is a symptom of a sprain or strain. The doctor agreed claimant's fall from the ladder caused an onset of swelling and pain and he treated claimant for those symptoms. Dr. Gilbert testified that it is common for meniscus surgery to later result in a need for a total knee replacement.

On his own, claimant sought treatment from Dr. Joseph E. Mumford, who on March 5, 2013, performed a left total knee replacement.

Claimant was evaluated at respondent's request by Dr. Chris D. Fevurly on June 21, 2012, which was prior to claimant's left knee replacement. Claimant reported having a prior left knee injury in 1992 that resulted in a meniscectomy. The doctor testified claimant did not see a doctor since that surgery, but reported having left knee discomfort that he lived with for about 20 years prior to his September 19, 2011, accident. Claimant had a limp when he saw Dr. Fevurly, which claimant indicated he did not have prior to his 2011 work accident.

According to Dr. Fevurly, when claimant "reinjured this knee on September 19, 2011, he [claimant] believes this was [an] aggravation of the pre-existing condition."[5] Dr. Fevurly testified claimant sustained a left knee sprain that acutely aggravated his underlying moderate degenerative arthritis. He testified that an x-ray of the left knee confirmed his diagnosis of moderate degenerative arthritis. Ultimately, Dr. Fevurly opined claimant's accident aggravated the left knee preexisting degenerative arthritis, but was not the prevailing factor causing his current left knee condition.

Dr. Fevurly indicated claimant's prior left knee injury and surgery, weight (231 pounds) and age (59 on September 19, 2011) contributed to his left knee degenerative arthritis. The doctor indicated it would be difficult to predict which of the foregoing three factors was the main factor causing the need for claimant's left total knee replacement, but if he had to pick a prevailing factor, it would be claimant's 1992 surgery.

Dr. Fevurly indicated there was no change in the physical structure of claimant's left knee as the result of his September 19, 2011, work accident. The doctor indicated the fluid in claimant's left knee and swelling did not constitute a lesion or change in physical structure. Dr. Fevurly testified the fluid drained from claimant's knee was likely a combination of synovial fluid and blood. He opined the blood probably came from the

[5] Fevurly Depo., Ex. 2.

destruction of a capillary, which is abnormal, but was not an anatomical structural change of the joint. Dr. Fevurly indicated medical treatment to repair claimant's destroyed capillary should not be necessary. The doctor acknowledged a torn meniscus is a structural change of the body.

Dr. Fevurly testified claimant's initial treatment was for his left knee strain he sustained on September 19, 2011, but after a period of time, claimant was treated for preexisting degenerative arthritis.

Using the *Guides*, Dr. Fevurly opined claimant had a 7 percent left lower extremity impairment for his preexisting left knee degenerative arthritis, which was based on a loss of cartilage height. He also opined claimant had a 10 percent left lower extremity impairment for loss of range of motion in his left knee as the result of his degenerative arthritis. The two functional impairments combine for a 16 percent left lower extremity impairment. The doctor opined the prevailing factor for claimant's entire functional impairment was his degenerative arthritis.

At Dr. Fevurly's deposition, the parties introduced Dr. Mumford's March 5, 2013, operative report. That record states, "Exam and radiographs have confirmed end-stage tricompartmental osteoarthritis."[6] The report goes on to state, "Osteophytes, anterior cruciate ligament, and meniscal remnants were thoroughly debrided."[7] Dr. Fevurly was asked to review Dr. Mumford's operative report. According to Dr. Fevurly, Dr. Mumford's surgical notes indicated claimant had tricompartmental degenerative arthritis and did not mention a meniscus tear. Dr. Fevurly indicated that his prevailing factor and impairment opinions did not change after reviewing Dr. Mumford's operative report.

When Dr. Fevurly evaluated claimant, he thought claimant would need a total knee replacement in one to two years, but also indicated he was uncertain how much sooner claimant's accident caused claimant to have a left total knee replacement. The doctor indicated that the need for knee replacement is dependent upon a patient's tolerance for pain. Dr. Fevurly testified claimant's symptoms from his 2011 left knee sprain, including pain, never went away until he had a left total knee replacement and are still there to some extent. He also agreed that a person of claimant's age who undergoes a total knee replacement will need future medical treatment, including x-rays, follow-up orthopedic visits and a possible second knee replacement.

When asked if claimant would need future injections, Dr. Fevurly testified he was not sure if that was a reasonable thing to do and to ask an orthopedist. The doctor

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[6] *Id.*, Ex. 4.

[7] *Id.*

indicated medication was needed for pain, but did not specify if he meant prescription or over-the-counter pain medication.

At the request of his attorney, claimant was evaluated by Dr. Edward J. Prostic, a board-certified orthopedic surgeon, on February 12, 2013. The doctor examined claimant and reviewed x-rays showing moderate medial joint space narrowing with neutral alignment of the knee. Dr. Prostic testified claimant's past medical history included having patellar surgery at age 7 and left knee arthroscopic surgery in South Dakota 23 years before Dr. Prostic's evaluation. Claimant reported having no symptoms in the 20 years prior to his September 19, 2011, accident. Dr. Prostic indicated claimant did have some preexisting left knee medial compartment degenerative arthritis.

Dr. Prostic diagnosed claimant with a torn posterior horn of the medial meniscus and recommended arthroscopic surgery. The doctor testified there was an 80 percent probability claimant had a torn meniscus and that falling from a ladder and twisting one's knee would cause a torn meniscus. However, the doctor later admitted claimant did not report twisting his left knee when he fell from the ladder. The doctor opined claimant's September 19, 2011, work accident was the prevailing factor causing his injury and need for medical treatment.

Dr. Prostic saw claimant a second time on May 20, 2014, after he had undergone a left total knee replacement and returned to work for respondent. Dr. Prostic testified he has performed between 100 and 300 total knee replacement surgeries. The doctor opined claimant's September 19, 2011, work accident was the prevailing factor causing his injury, need for medical treatment and resulting disability. Dr. Prostic testified that ". . . but for this accident and what I believe was tearing of the medial meniscus, it is unlikely that he would have required a total knee replacement for a good while."[8] Dr. Prostic confirmed Dr. Mumford's operative report did not provide information confirming his torn meniscus diagnosis.

According to Dr. Prostic, claimant had a fair result from his left total knee replacement and, using the *Guides*, opined claimant sustained a 50 percent left lower extremity impairment. Dr. Prostic testified claimant will likely require additional medical treatment. He went on to state claimant might benefit from injection of the bursa of the medial left knee, would need to have his left knee monitored in relation to the replacement, and might need a future knee replacement for infection, loosening or other complications.

Dr. Prostic indicated he was unaware of claimant's two prior right knee surgeries and did not take into consideration claimant's right knee condition. The doctor indicated claimant's right knee, as described, was as bad as claimant's pre-accident left knee. He agreed that the fact claimant had not needed a right total knee replacement was an

[8] Prostic Depo. at 18.

indication that claimant's September 2011 accidental injury caused his need for a left knee replacement.

By order of the ALJ, claimant was evaluated by Dr. Lowry Jones, Jr., on September 12, 2013. Dr. Jones' independent medical evaluation (IME) report is part of the record pursuant to K.S.A. 2011 Supp. 44-516. The doctor, who did not testify, reviewed claimant's medical records, including a CT scan obtained by Dr. Garrett that showed left knee degenerative changes. Dr. Jones stated:

> I believe that Mr. Gilbertson did have medial joint line arthritis based on a prior medial meniscectomy 23 years prior, x-ray evidence and clinical evidence of medial joint line arthritis. I believe that the injury aggravated this but did not cause his arthritis. I believe prevailing cause for the need for total knee replacement was his preexistent disease. I do believe that he sustained an injury on September 19, 2011. Having undergone total knee replacement, I cannot at this point determine the exact pain, limited motion and/or strength loss due to the injury vs. his subsequent knee replacement. I therefore, would suggest that the impairment rating given by Dr. Fevurly on June 21, 2012 based on AMA Guidelines of Permanent Partial Impairment [*sic*] appears to be very reasonable having reviewed his dictation and exam.
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> His rating summarized a 7% permanent partial impairment for his arthritic changes by x-ray which was preexistent, and a 10% permanent partial impairment based on his limited range of motion and swelling, which would be directly related to his injury.[9]

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[10] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[11]

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[9] Jones IME Report at 3.

[10] K.S.A. 2011 Supp. 44-501b(c).

[11] K.S.A. 2011 Supp. 44-508(h).

Claimant suffered an accidental left knee injury arising out of and in the course of his employment.

Respondent asserts claimant failed to prove he sustained a personal injury by accident arising out of and in the course of his employment. The Board disagrees. K.S.A. 2011 Supp. 44-508(f), in part, provides:

> (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
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> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
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> (B) An injury by accident shall be deemed to arise out of employment only if:
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> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
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> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

Respondent argues claimant did not sustain a lesion or change in the physical structure of the body, causing damage or harm thereto. As a result of his accident, claimant's left knee became swollen and developed fluid that was aspirated. Moreover, all four physicians who examined claimant indicated he sustained a left knee injury as the result of his 2011 work accident. Drs. Fevurly, Gilbert and Jones believed claimant incurred a knee sprain. Dr. Prostic opined claimant tore his left meniscus. Claimant's knee sprain resulted from a structural change in the body. The overwhelming medical evidence proves claimant sustained a left knee injury at work on September 19, 2011.

Claimant sustained a 10 percent left lower extremity functional impairment.

Claimant contends he tore his left meniscus during his September 19, 2011, work accident, which caused his need for a left knee replacement. The Board is not convinced the medical evidence proves claimant tore his left meniscus. Nothing in the record indicates the CT scan reviewed by Dr. Gilbert showed a torn left meniscus. Nor do Dr. Mumford's surgical notes indicate claimant tore his left meniscus. Drs. Fevurly, Gilbert and Jones did not opine claimant tore his meniscus.

Only Dr. Prostic opined claimant tore his meniscus. His testimony was there was an 80 percent probability claimant had a torn meniscus. The doctor's opinion was based at least partially on the mistaken belief that claimant twisted his left knee when he fell. Dr. Prostic acknowledged his torn meniscus diagnosis was not confirmed by information in Dr. Mumford's operative report. The Board finds the causation and prevailing factor opinions of Drs. Fevurly, Gilbert and Jones more credible than those of Dr. Prostic.

Claimant asserts that even if he did not tear his left meniscus, his work accident was the prevailing factor causing the need for his left knee replacement and he sustained a 43 percent left lower extremity functional impairment. In support of that assertion, claimant cites *Le*.[12] Ms. Le, who had preexisting, but asymptomatic osteoporosis, fell at work and sustained a vertebral fracture at the T10 level. The fracture healed, but Ms. Le continued to suffer pain which prevented her from returning to work. The Board concluded Ms. Le was not permanently and totally disabled and limited her award to a 15 percent permanent partial general disability and authorized future medical treatment only for the fracture. The Board concluded claimant's inability to work was due to her preexisting osteoporosis, based on Dr. Ciccarelli's opinion.

The Kansas Court of Appeals reversed and noted the issue was "whether Le's fall and the resulting fracture were the prevailing factor causing Le's 'resulting disability or impairment' under K.S.A. 2011 Supp. 44-508(f)(2)(B)(ii)."[13] The Court cited several Board orders that had interpreted K.S.A. 2011 Supp. 44-508(f)(2) to mean that accidental injuries resulting in a new physical finding, or a change in the physical structure of the body, are compensable despite the claimant also having sustained an aggravation of a preexisting condition.

Prior to her work accident, there was no indication Ms. Le suffered from chronic pain, although she suffered from severe osteoporosis at the time. The Kansas Court of Appeals, in *Le*, ruled her chronic pain was due to her fractured T10 vertebra and discounted Dr. Ciccarelli's opinion that her pain was due to her preexisting osteoporosis. This left Dr. Murati's opinion that claimant's compression fracture prevented her from returning to work, an opinion shared by Dr. Johnson. Basically, two of three doctors agreed claimant's inability to work was due to her work injury. In the present case, claimant had prior left knee surgery and all the physicians who evaluated claimant agreed he had preexisting left knee degenerative arthritis. Three of four physicians who evaluated claimant opined, and the Board agrees, that the prevailing factor causing the need for claimant's left knee replacement was degenerative disease, not his work accident.

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[12] *Le v. Armour Eckrich Meats*, ____ Kan. App. 2d ____, ____ P.3d ____ (2014), *rev. denied* Apr. 29, 2015.

[13] *Id.*

The Board finds that as a result of his September 19, 2011, work accident, claimant sustained a 10 percent left lower extremity functional impairment. The Board concurs with Dr. Jones' functional impairment opinion that claimant has a 10 percent left lower extremity functional impairment for loss of range of motion and swelling that was directly related to his work injury. Dr. Jones may have adopted Dr. Fevurly's rating, but he clearly drew a distinction between claimant's 7 percent rating for arthritis (not compensable as preexisting) and claimant's 10 percent rating for lost range of motion and swelling (compensable as due to work injury). Dr. Jones did not adopt Dr. Fevurly's causation opinion in full. The dissent incorrectly assumes Dr. Jones shared Dr. Fevurly's causation opinion.

Claimant is not entitled to apply for future medical benefits.

K.S.A. 2011 Supp. 44-510h provides a presumption that respondent's liability for medical expenses terminates upon maximum medical improvement, unless medical evidence proves it is more probably true than not additional medical treatment will be necessary.

The medical evidence concerning whether claimant needs future medical treatment is mixed. Dr. Jones provided no opinion on the issue. Dr. Gilbert made no recommendations on whether claimant needed future medical treatment for his September 19, 2011, work injuries. Dr. Fevurly saw claimant prior to his left knee replacement. The doctor testified he was uncertain if claimant would need future knee injections, but would need pain medication. He did not specify whether claimant would need prescription or over-the-counter pain medication. Dr. Prostic was the lone physician who opined claimant would need future medical treatment. However, the future medical treatment he recommended was for claimant's left knee replacement, not for claimant's work-related knee sprain. In addition, Dr. Prostic was only certain claimant would need follow-up visits to monitor his left knee replacement. Dr. Prostic's opinion that claimant might need injections or a future knee replacement is speculative. Simply put, claimant failed to provide sufficient medical evidence proving it is more probably true than not he will need future medical treatment for his work injury.

CONCLUSION

1. On September 19, 2011, claimant suffered a personal injury by accident arising out of and in the course of his employment and sustained a 10 percent left lower extremity functional impairment.

2. Claimant is not entitled to future medical benefits.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[14] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the April 29, 2015, Award entered by ALJ Sanders as corrected by the Nunc Pro Tunc Awards.

IT IS SO ORDERED.

Dated this ____ day of November, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

This Board Member must respectfully dissent from my colleagues on the issue of the nature and extent of claimant's disability.

The majority relied on the report of Dr. Jones, the court-appointed neutral physician, in finding claimant sustained a 10 percent permanent impairment to the left leg as a result of the accidental injury. However, as is easily seen from pages five and seven of the majority opinion, Dr. Fevurly did not rate claimant's injury at 10 percent. Rather, Dr. Fevurly's entire rating, including the 10 percent, resulted from claimant's preexisting degenerative arthritis. Hence, in relying on Dr. Jones' impairment opinions to support the 10 percent award, the majority adopts a rating by Dr. Jones that is based on a misreading by Dr. Jones of Dr. Fevurly's rating opinions. The ALJ's decision to award permanent

[14] K.S.A. 2014 Supp. 44-555c(j).

partial disability (PPD) benefits for a 10 percent impairment to the left leg was also based on the same flawed report of Dr. Jones.

The ALJ's award should accordingly be reversed as to the nature and extent of claimant's disability, finding no impairment and awarding no PPD.

BOARD MEMBER

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Honorable Rebecca A. Sanders, Administrative Law Judge